In The

Supreme Court of the United States

October Term, 1978

No. 79-367

STANLEY ROBERT RAPPAPORT,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TABLE OF CONTENTS

Contents

TABLE OF CITATIONS

Cases Cited:

Contents

Statutes Cited:

United States Constitution Cited:

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THE PEOPLE OF THE STATE OF NEW YORK,

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Petitioner respectfully prays that this Court issue a writ of certiorari to review the order and opinion of the Court of Appeals of the State of New York rendered the 7th day of June 1979, affirming the order of the Supreme Court of the State of New York, Appellate Division, First Department, which had reversed an order of the Supreme Court, New York County, which had dismissed the indictment, and reinstated the indictment charging Rappaport with the felony of criminal contempt in the first degree (N.Y. Penal Law §215.51), ruling that the petitioner need not have been warned and advised "contemporaneously", during his grand jury appearance, that his answers were evasive and might constitute criminal contempt.

OPINIONS BELOW

The opinions of the Court of Appeals, Appellate Division, and New York Supreme Court, are reproduced, *infra*, as an appendix.

The order of the Appellate Division, First Department, reversing Honorable Harold J. Rothwax, was made the 27th day of December 1977. The opinion of Justice Harold J. Rothwax dismissing the indictment was dated November 30, 1976.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The order and opinion of the Court of Appeals of the State of New York was made the 7th day of June 1979. The Appellate Division order was December 27th, 1977, reported 60 A.D. 2d 565.

QUESTIONS PRESENTED

1. Whether a witness, compelled to testify before a grand jury under a grant of immunity, who has received only general advice concerning evasive contempt, must be warned and readvised contemporaneously by the grand jury, the prosecutor or the court, that his answers are evasive or equivocal and, therefore, may constitute criminal contempt?

2. Whether a witness, compelled to testify before a grand jury under immunity, must be warned during such testimony that his continued recalcitrance in answering proper questions may expose him to charges of criminal contempt as a *sine qua non* before any indictment for such contempt may be returned (Fourteenth Amendment, United States Constitution)?

3. Whether petitioner was denied due process of law by being lulled into a false sense of security that his answers during

a compelled grand jury appearance were apparently satisfactory, when in retrospect, the grand jury decided that his answers had been evasive and therefore, indicted him for evasive contempt (N.Y. Penal Law §215.51)?

4. Whether any witness compelled to testify before a grand jury can be charged with criminal contempt for giving evasive answers, without ever receiving any specific warning or advice during his testimony that his answers were evasive or unsatisfactory (Fifth and Fourteenth Amendments, United States Constitution)?

5. Whether petitioner was denied his Sixth and Fourteenth Amendment rights to the assistance of counsel when he was compelled to testify before a grand jury in the enforced absence of such counsel and subsequently indicted for evasive criminal contempt without ever having been advised or cautioned that the grand jury considered his responses evasive and contemptuous (N.Y. Criminal Procedure Law §190.52)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth and Fourteenth Amendments of the United States Constitution; Section 215.51, New York Penal Law; and Sections 190.52 and 190.40, New York Criminal Procedure Law, are involved herein.

BACKGROUND OF THE CASE

The petitioner is a licensed auctioneer who had been assigned to sell certain property involved in a matrimonial lawsuit. In 1976, he was subpoenaed to appear as a witness before a grand jury which was investigating a complaint that there had been corrupt influence by the husband or his agents in connection with the matrimonial action.

Rappaport was compelled to testify on three separate occasions during 1976, namely, July 13th, 14th and 23rd.

The response which resulted in a one count indictment alleging criminal contempt took place on the last appearance before the grand jury, which was the third day of testimony, and separated by a nine-day hiatus following the last previous appearance.

The questions and answers set forth in the indictment and in the opinion of Justice Rothwax, which comprise about a dozen questions out of 1,500 propounded, were the basis for the indictment.[1]

At the beginning of his testimony, that is the first day of his testimony, the District Attorney advised petitioner generally of the nature of the investigation and informed him that despite the fact that he was receiving immunity, he could still nevertheless be prosecuted for perjury or contempt before the grand jury. The prosecutor declared that contempt could be committed in two ways, namely (1) by expressly refusing to answer proper questions, or (2) ". . . by giving a response to a legal and proper interrogatory that is so evasive, so equivocal, so conspicuously unbelievable and patently false, as being the same thing as saying I'm not going to answer."

During his second appearance before the grand jury, which was the next day, namely July 14th, petitioner was questioned about a conversation he had with an individual who was allegedly acquainted with the husband in the matrimonial action.

1. There are certain blanks deliberately left in the reproduction of the testimony involving names because the courts below ordered that information "sealed".

At one point during this second appearance, the petitioner was reminded and warned that he could be prosecuted for contempt if he gave evasive answers, but was not indicted with respect to any answers given on the second appearance.

During his final appearance, which occurred nine days later (July 23rd), the petitioner-defendant was never again warned about contempt or perjury, nor was he told that any of his responses were unsatisfactory or evasive.[2]

The inquiries propounded to the petitioner and his responses thereto which resulted in the one count indictment for criminal contempt centered around questions concerning "kickbacks". The crucial questions resulting in the responses precipitating the contempt indictment, were the following, *inter alia*, (pp. 219-220 and 273-274 of the Grand Jury Minutes):

"Q. Now, did you ever tell anyone that Mr. _____ kicks back sixty percent? A. I may have but here again another figment of my imagination. I couldn't, you know, attest to anything like that.

Q. Who did you tell? A. I may have told Mrs. _____.

Q. You recall when? A. No, sir.

Q. What were you referring to? A. I can't even — I can't even specifically say I said that.

2. It should be noted that under New York law at that time, a defendant compelled to appear before a grand jury, could not be represented by counsel inside the grand jury room, but later had to hope that he had a good enough memory to remember the questions propounded, and then seek permission to leave the grand jury so he could speak to a lawyer outside of that chamber (CPL, Section 190.25; *People v. Ianniello*, 21 N.Y. 2d 418, 288 N.Y.S. 2d 462, *cert. denied*, 393 U.S. 827, 21 L. Ed. 2d 98; *People v. Ward*, 37 App. Div. 2d 174, 323 N.Y.S. 2d 316).

Q. Well now wait a minute, Mr. Rappaport, the grand jury is trying to investigate whether or not crimes like bribery and bribe receiving and official misconduct have been committed. And it is important and material and necessary for this grand jury to know whether or not you told anyone that _____ the referee kicked back money. A. I don't recall. I don't remember if I said that or not.

Q. Well, let me make it simpler perhaps. Have you within the past two months told anyone that _____ , the referee, kicked back money? A. I don't recall. I don't remember if I said that or not.

Q. Well, let me make it simpler perhaps. Have you within the past two months told anyone that _____, the referee, kicked back money? A. That doesn't simplify it at all. I just still don't remember whether I said it or not.

Q. Did you in the past two months tell anyone that _____, the referee, kicked back sixty percent. A. I can't attest to that at all.

Q. Did you within the past two months tell anyone that _____ had kicked back sixty percent to a Democratic Club? A. I can't attest to that. That's what I am trying to tell you. I don't remember if I did say it or not.

Q. Did you within the past two months say in the presence of Mr. _____ and Mrs. _____, that _____ kicked back sixty percent to a Democratic Club? A. I can't recall saying it, I — but I won't attest to it one way or the other if I said it or not."

* * *

"Q. Let me get back for a moment to an area we have covered. You understand that part of what the grand jury is trying to find out is whether or not Mr. _____ in return for receiving these references from Justice _____ is required to make payments to political clubs or to aid political clubs, you understand that is one of the things the jury is trying to find out? A. Right.

Q. And you can appreciate that that is an important question given the facts before this jury as far as you know them, through your own testimony? A. Yes, sir.

Q. Let me ask you again then sir. Did you within the past two months say in the presence of Mr. _____ and Mrs. _____ that Mr. _____ kicked back sixty percent of what he made on references to a democratic club? A. I may have said it however I have nothing to substantiate that."

Although raised in the *nisi prius* court, but never reached as yet, was the fact that the questions themselves were clearly immaterial to the thrust of the indictment and should have been barred, or at least the indictment should have been dismissed on that basis alone.

REASONS FOR GRANTING THE WRIT

I.

The compelled testimony of petitioner herein, notwithstanding a grant of immunity, should not have exposed him to prosecution for contempt without a contemporaneous warning during his testimony that his answers to certain questions were evasive, contumacious, or so inadequate, as to constitute no answer at all. Since no such contemporaneous warnings were given, the state courts violated petitioner's due process rights by finding him in contempt of the grand jury, despite his apparent full and complete answers to all questions.

Petitioner Rappaport was summoned before a grand jury, granted immunity automatically under New York law (CPL §190.40), and was asked a number of questions (*supra*). In all instances, Rappaport responded to those questions, and at no time during the questions which gave rise to the indictment itself, was Rappaport warned or cautioned that his answers were equivocal, evasive or inadequate, or that he was being recalcitrant in answering proper questions.

So far as Rappaport knew, or his attorney who was outside the grand jury room, he was giving full and satisfactory answers.

Ironically, the prosecutor informed the trial judge that they were unaware that a contempt citation or indictment was warranted, except in retrospect when they read the minutes and decided that the answers were not satisfactory.

Until the indictment was returned, the petitioner was completely unaware that his answers were unsatisfactory, and was unable to cure the situation, as he might have if he had received a contemporaneous warning that his answers were deemed evasive, equivocal, or unsatisfactory, and that his conduct was, therefore, recalcitrant and contemptuous.

On the contrary, it is uncontradicted that Rappaport was at all times courteous, cooperative, and appeared anxious to respond to the best of his ability. (*See People v. Cutrone,* 50 App. Div. 2d 838, *appeal dismissed,* 40 N.Y. 2d 988; *People v. Didio,* 60 App. Div. 2d 978, *dissent.*)

It must be borne in mind that Rappaport was not indicted for perjury, but rather, for contempt. The prosecution and the grand jury, therefore, have not accused him of lying. (*See In re Michael,* 326 U.S. 224, which cites with approval the New York Court of Appeals decision in *People ex rel. Valenti v. McCloskey,* 6 N.Y. 2d 390, 403, *affirming* 8 App. Div. 2d 74 [1st Dept.].)

Indeed, the Court of Appeals seems to have been totally inconsistent in the case at bar because their affirmance of the First Department herein seems to contradict their own decision in *People v. Renaghan,* 40 App. Div. 2d 150, *aff'd,* 33 N.Y. 2d 991, 992, where the Court of Appeals explained:

> "Defendant was charged with a violation of section 215.50 of the Penal Law for his alleged contumacious and unlawful refusal to answer certain questions during a Grand Jury investigation, in which it was claimed that he gave conspicuously evasive and patently false answers relating to whether a Detective Keeley told the defendant that Hugh Mulligan would like to have a Detective Sangiriardi assigned to a special investigative unit. On the record before us, including as it does defendant's unequivocal denials of the District Attorney's interrogatories in this regard at the inception of the questioning, we cannot conclude that defendant's answers were not a bona fide effort to answer the questions. Defendant's initial responses to the District Attorney's inquiries expressly denied that

he was told by Keeley that Mulligan requested the transfer of Sangiriardi. *This explicit testimony was neither incredible as a matter of law nor patently false* (cf. *Matter of Ruskin v. Detken*, 32 N.Y. 2d 293, 297), *and if later shown to be false, could provide a sufficient basis for a perjury charge. Accordingly, even if perjurious, the subsequent testimony could not properly be deemed a refusal to answer as was contemplated by section 215.50 of the Penal Law (People ex rel. Valenti v. McCloskey*, 6 N.Y. 2d 390, 402-403; *United States v. Appel*, 211 F. 495). For whatever purpose and however the question was thereafter rephrased by the District Attorney, it had already been answered with firmness and without equivocation. In these circumstances there is no indication that defendant's alleged failure to unequivocally respond to the rephrased questions on the same subject obstructed in any way the Grand Jury's proceedings (cf. Matter of Michael, 326 U.S. 224)." (Emphasis ours.)

See also, Brown v. United States, 245 F.2d 549 (8 Cir. 1957), and *United States v. Cross*, 170 F. Supp. 303 (D.C., D.C. 1959); also, *United States v. Icardi*, 140 F. Supp. 383 (D.C., D.C. 1956).

If this were a federal tribunal, a witness before a grand jury could persist in refusals to answer questions, let alone answer them equivocally, before he could be exposed to contempt, since he would first have to be brought before a judge and specifically ordered to answer. (*Shillitani v. United States*, 384 U.S. 364; *Harris v. United States*, 382 U.S. 162; and *United States ex rel. Buonoraba v. Commissioner*, 316 F. Supp. 556 [S.D.N.Y. 1970].)

In *Buonaraba, supra*, the District Court opined (316 F. Supp. at 560):

> "In affirming petitioners' convictions, the New York Court of Appeals followed earlier New York cases construing these statutes, which have consistently held that as long as the statutory formula for conferring immunity under former Penal Law §2447 is followed, as it was here, the grand jury has power to order the witness to respond to 'any legal or proper' question under pain of contempt without a further directive or order from the court. This construction of the New York statutes by the highest court of the state raises the question of whether petitioners were deprived of due process when they were indicted, tried and convicted of criminal contempt, although no court ever ordered or directed them to answer the grand jury's questions.
>
> We note at the outset that the state procedure differs from federal practice, which entitles a witness before a grand jury to persist in his refusal free from contempt until the court orders him to answer. States, however, have wide latitude to fashion their own rules of criminal procedure. The Due Process Clause of the Fourteenth Amendment requires that these procedures be fundamentally fair in all respects, but it does not impose on the states the rules that may be in force in the federal courts, except where such rules are also found to be essential to basic fairness."

* * *

"The Fourteenth Amendment denies the states the power to 'deprive any person of life, liberty or property without due process of law.' Many of the rights guaranteed by the first eight amendments to the Constitution have been held to be protected against state action by the Due Process Clause, including the Sixth Amendment's right to counsel, to a speedy and public trial, to confrontation of opposing witnesses and to compulsory process for obtaining witnesses.

The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways. Federal courts seek to determine whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' whether it is 'basic in our system of jurisprudence,' and whether it is 'a fundamental right, essential to a fair trial.' "

II.

The indictment and conviction of the petitioner was also unconstitutional in that the failure to contemporaneously warn Rappaport that his conduct or answers might lead to an indictment for contempt, failed to apprise him that his conduct might subject him to prosecution for a crime. In other words, the New York statute is such that it permits the indictment of a person for contempt of a grand jury without the slightest inkling on the part of that person that his conduct is evasive or contumacious.

It is elementary that due process requires "that the crime be defined with sufficient clarity so that a person with ordinary intelligence has fair notice that his contemplated conduct is forbidden" (*Papachristou v. City of Jacksonville,* 405 U.S. 156).

At no time, as has been previously indicated, was any hint even given to Rappaport that he was courting the possibility of contempt (*cf. Brown v. United States, supra; United States v. Cross, supra,* and *United States v. Icardi, supra*).

In the court below, the prosecution cited *United States v. Winter,* 348 F.2d 204, 210 (2 Cir. 1965), which we believe indicates that both it and the court are confusing perjury (involved in the *Winter* case) and contempt.

The Sixth Amendment requires that every person accused shall "be informed of the nature and cause of the accusation". This is binding upon both federal and state courts (*Cole v. Arkansas,* 333 U.S. 192, 92 L. Ed. 644).

We submit further that this Court, not only in *Papachristou v. Jacksonville,* but in *Palmer v. Euclid,* 402 U.S. 544, 29 L. Ed. 2d 98, has condemned convictions predicated upon statutes or accusations which fail to give a person of ordinary intelligence

fair notice that his contemplated conduct is forbidden and also because "it encourages arbitrary and erratic arrests and convictions".

The vice of what occurred herein is that the petitioner was given every reason to believe that his answers were perfectly acceptable and proper and was unable to communicate to his attorney, waiting outside the grand jury room, that there was a possible dissatisfaction with those answers. Had he been given such a warning, as we believe due process requires, then something could have been done at once to cure the situation and an indictment could have been avoided.

The *nisi prius* court noted that even the *prosecutor admitted that he was unaware that Rappaport had been contemptuous* until a *retrospective determination* was made to indict him, *not* for perjury, but for contempt.

If the prosecutor was unaware of any contempt, how could petitioner be guilty of felonious intent!

At the very least, we submit that due process of law requires that a person called before a grand jury and compelled to testify, irrespective of the fact that he is granted immunity, must either be taken before a judge and cautioned that his answers may subject him to prosecution, or at least contemporaneously cautioned about his conduct so that he may rectify the situation if possible.

Otherwise, the prosecutor is building a trap to ensnare a hapless defendant who is never apprised that he has done something wrong, nor that he has violated some mysterious standard, until he is indicted.

CONCLUSION

Certiorari should be granted, and upon review by this Court, the order of the trial judge dismissing the indictment should be reinstated.

Respectfully submitted,

IRVING ANOLIK and
TELLERMAN, PATICOFF
AND GREENBERG
Attorneys for Petitioner

APPENDIX

ORDER AND OPINION OF THE COURT OF APPEALS STATE OF NEW YORK

STATE OF NEW YORK

COURT OF APPEALS

No. 216

The People &c.,

Respondent,

vs.

Stanley Robert Rappaport,

Appellant.

(216) Irving Anolik, NY City, for appellant.

Robert M. Morgenthau, DA, NY County (David Rapaport & Robert M. Pitler of counsel) for respondent.

THE ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT IS AFFIRMED.

ALL CONCUR.

June 7, 1979

Order and Opinion of the Court of Appeals State of New York

STATE OF NEW YORK

COURT OF APPEALS

No. 216

The People &c.,

Respondent,

vs.

Stanley Robert Rappaport,

Appellant.

(216) Irving Anolik, NY City, for appellant.

Robert M. Morgenthau, DA, NY County (David Rapaport & Robert M. Pitler of counsel) for respondent.

WACHTLER, J.

The defendant has moved to dismiss an indictment charging him with criminal contempt in the first degree (Penal Law §215.51) for allegedly giving evasive answers while testifying before a Grand Jury under a grant of immunity. The Supreme Court, New York County, granted the motion but the Appellate Division, First Department, reversed and reinstated the indictment. The defendant appeals.

The question is whether a Grand Jury witness who has been granted immunity and warned concerning evasive contempt must later be readvised or "contemporaneously" warned by the Grand Jury, the prosecutor or the court that the answers he is

Order and Opinion of the Court of Appeals State of New York

giving are evasive and thus may constitute criminal contempt. The Appellate Divisions which have considered the question have apparently established inconsistent rules (compare *People v. Cutrone*, 50 AD2d 838, app dsmd 40 NY2d 988, with *People v. Dido*, 60 AD2d 978; *People v. Rappaport*, 60 AD2d 565).

The defendant is an auctioneer who had been assigned to sell certain property involved in a matrimonial action. In 1976 he was called to appear as a witness before a Grand Jury which was investigating a complaint that the matrimonial action had been corruptly influenced by the husband or persons acting on his behalf. The defendant testified before the Grand Jury on three occasions: July 13, 14 and 23.

At the defendant's first appearance the District Attorney advised him, on the record, of the nature of the investigation and also informed him that although he would receive immunity he could still be prosecuted for perjury or contempt committed while testifying before the Grand Jury. The prosecutor further stated that contempt could be committed in two ways: (1) by expressly refusing to answer proper questions or (2) "by giving a response to a legal and proper interrogatory that is so evasive, so equivocal, so conspicuously unbelievable and patently false as to be the same thing as saying I'm not going to answer." Finally the prosecutor gave the defendant an example of evasive contempt[1]

1. "Q. Let me give you an example. Let's assume in the context of this investigation it were a legal and proper question for me to ask you did you get married last week. And let's assume that the witness to whom that question was addressed said, maybe yes, maybe no. It's possible I got married last week, and indeed it is probable I got married last week but I don't remember. That type of response to that type of question may subject that witness to prosecution for the crime of criminal contempt because as I am sure you'll agree that is so evasive, so equivocal and so conspicuously false that it is the same thing as saying I am not going to answer that. Now, do you understand that?

A. Yes, I do." (Resp. Br. p. 5)

and permitted him to consult with counsel after which the defendant stated — and reiterated on each occasion that he appeared before the Grand Jury — that he had no questions concerning his status as an "immunized witness" and was prepared to answer questions.

During his second appearance before the Grand Jury the defendant was questioned about a conversation he had with an individual who was allegedly acquainted with the husband in the matrimonial action. The defendant testified that this individual had stated that he and the Justice presiding at the matrimonial action were "friends" but the defendant denied that "anything more" had been said about the relationship. At that point he was again reminded of his obligations as an "immunized witness" and was warned that he could be prosecuted for contempt if he gave evasive answers. The defendant however did not alter his testimony, nor was he indicted for contempt.

At his final appearance the defendant was asked whether he had told anyone that the referee who had been appointed in the matrimonial action "kicked back" sixty per cent of his fees to persons who were responsible for his appointment. The defendant responded that he "may have" but he could not "attest" to it. When asked who he told, the defendant said that he "may have" told the wife in the matrimonial action, but he stated "I can't even specifically say I said that."

The prosecutor then informed the defendant of the importance of this inquiry, which was conceded by the defendant, and repeated the question in various forms. For instance, he asked the defendant whether he recalled telling this to anyone "within the past two months"; whether he recalled mentioning this to the wife in the matrimonial action in the presence of another named individual and whether he stated that

the "kick back" would go to a designated political organization. The defendant, however, repeatedly stated that he could not "recall saying it" and would not "attest to it one way or another if I said it or not." After pursuing other subjects the prosecutor returned to this inquiry, but the defendant continued to deny any recollection of having made the statement.

The defendant was indicted for criminal contempt. The indictment states that "On July 23, 1976, upon being asked whether he had told her [the wife in the matrimonial action] that the referee kicked back monies to a political clubhouse, the defendant contumaciously and unlawfully refused to answer the legal and proper interrogatories in that the defendant gave equivocal, evasive, conspicuously unbelievable and patently false answers."

On motion by the defendant the trial court dismissed the indictment relying on *People v. Cutrone* (50 AD2d 838) which states that a witness must "be warned that his continued recalcitrance in answering proper questions would expose him to charges of criminal contempt." Here the court noted that the defendant had received prior warnings, but none during his final appearance and, although he gave "patently evasive replies to certain inquiries" on that occasion "neither the district attorney nor the foreman interrupted to direct him to answer responsively, nor was he brought before the court to be properly admonished and advised." The court concluded that "[u]nder the rationale of *Cutrone*, it would seem that a warning, to be effective, must be delivered, not only before a witness first begins to testify, but also at a time when he still has an opportunity to cure his unresponsiveness; that is, contemporaneously with the questioning which elicited the evasive answers."

The Appellate Division reversed holding that the prior warnings, coupled with the repeated questions on July 23 were

sufficient to apprise the defendant of his vulnerability to a charge of evasive contempt. The court also noted that "If we were to adopt a rule that required the prosecution to warn the witness every time an otherwise unresponsive answer was made, the witness might, quite rightly, claim harassment."

In this state a witness who testifies before a Grand Jury automatically receives immunity, except in certain circumstances not applicable here (CPL 190.40, subd 2). By statute this immunity not only protects the witness from subsequent use of his testimony, as is required by the Federal Constitution (*Kastigar v. United States,* 406 US 441), but also absolves him from all criminal liability, penalty or forfeiture for any "transaction. . .concerning which he gave evidence' (CPL 50.10, subd 1). The statute provides, however, that the immunity does not extend to perjury or contempt committed while testifying before the Grand Jury (CPL 50.10, subd 1). The statute provides, however, that the immunity does not extend to perjury or contempt committed while testifying before the Grand Jury (CPL 50.10, subd 1). And "[t]o be guilty of contempt the witness need not flatly refuse to answer the questions put to him; false and evasive profession of an inability to recall, which amounts to no answer at all, is punishable as criminal contempt" (*People v. Ianniello,* 36 NY2d 137, 142; see also *People ex rel Valenti v. McCloskey,* 6 NY2d 390).

We have held that "fundamental fairness" requires that the witness be informed of the extent of the immunity conferred by the statute (*People v. Masiello,* 28 NY2d 287, 291; *People v. Mulligan,* 29 NY2d 20; *People v. Tramunti,* \$9 NY2d 28). "At the very least . . . the witness must be advised that he may not be prosecuted criminally concerning any transaction about which he might be questioned" (*People v. Masiello, supra,* p 291). And although it may appear to be obvious that a sworn witness who has been granted immunity must testify truthfully

and, perhaps less obvious, answer all lawful questions, the statute expressly provides, and the witness should be informed, that he will not be immune from prosecution for perjury if he lies, or for contempt if he refuses to answer or gives evasive replies. This should not require an extended explanation (see e.g., *People v. Masiello, supra,* p 291, 292), nor should the prosecutor be required to repeat the admonition, or have the court direct an answer,every time the witness'testimony becomes vague or evasive.

The holding in the *Cutrone* case, that the witness must be contemporaneously warned that he is courting cortempt, is not supported by the cases cited in the opinion (*Matter of Second Additional Grand Jury of County of Kings v. Cirillo,* 16 AD2d 605; *Matter of Foster v. Hastings,* 263 NY 311; *People v. Ianniello,* 21 NY2d 418). The court apparently confused the requirement that a Grand Jury witness be fairly advised of the extent of his immunity, with the special requirements of summary contempt proceedings. In the summary proceedings, of course, the witness must be brought before the court and directed to answer before he may be held in contempt (*Matter of Second Additional Grand Jury of County of Kings v. Cirillo, supra; Matter of Foster v. Hastings, supra).* This, however, is not a prerequisite to a charge of criminal contempt (see Penal Law §215.51) although we have noted that taking the witness before the court may reduce stalling tactics and expedite the proceeding (*People v. Ianniello,* 21 NY2d 418, 425). Indeed in the *Ianniello* case the indictment was sustained (21 NY2d 418) and the conviction for criminal contempt upheld (36 NY2d 137) despite the fact that the defendant had never been brought before the court and directed to give a more responsive answer.

Resort to the court, particularly through summary contempt proceedings, has always been considered an optional remedy. An admonition or direction from the court or the

prosecutor may, in some cases, persuade the witness to give a more responsive answer but it is not necessary to put the witness on notice when, as here, he had been fairly, indeed generously, informed of the extent of his immunity and his continuing liability to criminal prosecution if he answers evasively. Of course even when the witness has been fairly warned at the outset the prosecutor may not thereafter attempt to trap the witness into giving confusing or evasive replies (cf. *People v. Tyler,* 46 NY2d 251; *People v. Pomerantz,* 46 NY2d 240; *People v. Shenkman,* 46 NY2d 232). But in this case it cannot be said that the witness was caught in a "contempt trap" in view of the prosecutor's careful reframing and repetition of the questions and his representation, acknowledged by the witness, that the inquiry was important to the matter under investigation (cf *People v. Tyler, supra; People v. Pomerantz, supra; People v. Shenkman, supra*).

Accordingly the order of the Appellate Division should be affirmed.

* * *

Order affirmed. Opinion by Wachtler, J. Concur: Cooke, Ch.J., Jasen, Gabrielli, Jones and Fuchsberg, JJ.

Decided June 7, 1979

OPINION AND ORDER OF JUSTICE ROTHWAX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 35

(Same Title)

ROTHWAX, J.:

The defendant herein was indicted by the Grand Jury of New York County on one count of criminal contempt in the first degree, in violation of section 215.51 of the Penal Law. He is charged with having "contumaciously and unlawfully refused to answer the legal and proper interrogatories" by giving "equivocal, evasive, conspicuously unbelievable and patently false answers" in the following exchange (pp. 219-220 and 273-274 of the Grand Jury Minutes):

"Q. Now, did you ever tell anyone that Mr. _____ kicks back sixty percent? A. I may have but here again another figment of my imagination. I coudn't, you know, attest to anything like that.

"Q. Who did you tell? A. I may have told Mrs. _____

"Q. You recall when? A. No. sir.

Q. What were you referring to? A. I can't even—I can't even specifically say I said that.

"Q. Well now wait a minute, Mr. Rappaport, the grand jury is trying to investigate whether or not crimes like bribery and bribe receiving and official misconduct have been committed. And it is important and material and

necessary for this grand jury to know whether or not you told anyone that _____ the referee kicked back money. A. I don't recall. I don't remember if I said that or not.

"Q. Well, let me make it simpler perhaps. Have you within the past two months told anyone that ____, the referee, kicked back money? A. That doesn't simplify it at all. I just still don't remember whether I said it or not.

"Q. Did you in the past two months tell anyone that _____, the referee, kicked back sixty percent. A. I can't attest to that at all.

"Q. Did you within the past two months tell anyone that _____ had kicked back sixty percent to a Democratic Club? A. I can't attest to that. That's what I am trying to tell you. I don't remember if I did say it or not.

"Q. Did you within the past two months say in the presence of Mr. _____ and Mrs. _____, that _____ kicked back sixty percent to a Democratic Club? A. I can't recall saying it, I—but I won't attest to it one way or the other if I said it or not.

* * *

"Q. Let me get back for a moment to an area we have covered. You understand that part of what the grand jury is trying to find out is whether or not Mr. _____ in return for receiving these references from Justice _____ is required to

make payments to political clubs or to aid political clubs, you understand that is one of the things the jury is trying to find out? A. Right.

"Q. And you can appreciate that that is an important question given the facts before this jury as far as you know them, through your own testimony? A. Yes, sir.

"Q. Let me ask you again then sir. Did you within the past two months say in the presence of Mr. _____ and Mrs. _____ that Mr. _____ kicked back sixty percent of what he made on references to a democratic club? A. I may have said it however I have nothing to substantiate that.

* * *

September 10, 1971, appeared for the fifth time before a grand jury which was conducting an investigation into the activities of particular organized crime figures. He had initially been granted immunity on May 10, 1970, but the grant of immunity was repeated during his September appearance when the foreman, in part, stated that: "However, I wish to point out to you at this time that this grant of immunity which has just been conferred upon you by this Grand Jury does not prohibit you from being prosecuted or being subject to penalty or forfeiture for any perjury or any contempt committed by you in answering or failing to answer or in producing or failing to produce evidence." The defendant was thereupon questioned, and he gave patently evasive replies to certain inquiries which were made of him, yet neither the district attorney nor the foreman interrupted to direct him to answer responsively, nor was he brought before the court to be properly admonished and advised. Instead, the defendant was ordered to return again on October 1, 1971 and,

on October 15, he was indicted on three counts of criminal contempt. According to the court, the defendant had not been warned that his continued recalcitrance in answering would expose him to charges of criminal contempt, and, therefore, the indictment against him could not stand.

In the instant case, the defendant appeared on three separate occasions before a grand jury investigating whether the crimes of bribery, bribe receiving, rewarding official misconduct, conspiracy and related offenses had been committed within the County of New York. His first session took place on July 13, 1976, at which time he was granted full immunity. He was then informed that he could, nonetheless, be prosecuted for perjury or contempt and was provided with a detailed explanation as to what sort of conduct constitutes criminal contempt (pp. 10-11 of the Grand Jury Minutes). At his next appearance, July 14th, the defendant was again instructed that: ". . . even an immunized witness may be subject to prosecution should that immunized witness give answers that are so false, so evasive and as not giving answers at all." (p. 191 of the Grand Jury Minutes). On his third appearance nine days later, which was on July 23rd, the defendant received no warnings at all except admonitions in the nature of: "Well, that is for the grand jury to decide ultimately," (at p. 235) and "Mr. Rappaport, the grand jury is attempting to ascertain whether or not certain people have fixed a case. It is a very serious matter and you're here to testify truthfully as to all you know in connection with the grand jury's investigation," (at p. 242); and, even here, the district attorney's statements were unrelated to the line of questioning for which the defendant was later indicted. It was on this final day of interrogation that the defendant gave his allegedly "equivocal, evasive, conspicuously unbelievable and patently false answers."

Under the rationale of Cutrone, it would seem that a warning, to be effective, must be delivered, not only before a witness first begins to testify, but also at a time when he still has

an opportunity to cure his unresponsiveness; that is, _____ _____ contemporaneously with the questioning which has elicited the evasive answers. Clearly, this was not done in the instant case. The general warnings which were given to the defendant at the start of his appearance and which were alluded to during the course of the second session were in no way repeated on July 23rd, the critical day of testimony, nor was the defendant told that his continued refusal to answer responsively to the questions being asked of him would make him liable to a charge of criminal contempt. Although the district attorney has conceded that it would have been advisable to provide such a warning, he argues that the People did not realize at that point in the proceedings that the defendant's replies were evasive. However, if the prosecution is not aware that a grand jury witness is being recalcitrant, then how can that witness be expected to know that his answers are not acceptable? Moreover, this court does not agree that People v. Cutrone is either an aberration from prior state law or has been undermined by the recent United States Supreme Court decision in United States v. Mandujano, supra. See People v. Ianniello, 21 NY 2d 418 (1968). Consequently, the defendant's motion to dismiss the indictment against him is hereby granted.

In view of the foregoing, it is unnecessary for the court to consider defendant's other contentions. This constitutes the opinion and order of the court.

Dated: Part 35 Nov. 30 1976

s/ Harold Rothwax
J.

ORDER OF APPELLATE DIVISION

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 27, 1977

Present—Hon. Vincent A. Lupiano, Justice Presiding,
Samuel J. Silverman
Herbert B. Evans
Arthur Markewich, Justices.

The People of the State of New York,

Appellant,

-against-

Stanley Robert Rappaport,

Defendant-Respondent.

1429

An appeal having been taken to this Court by the appellant from an order of the Supreme Court, New York County (Rothwax, J.) entered on November 30, 1976, dismissing the indictment charging defendant with criminal contempt in the first degree, and said appeal having been argued by Mr. David Rapaport of counsel for the appellant, and by Mr. Irving Anolik of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

Order of Appellate Division

It is unanimously ordered that the order so appealed from be and the same is hereby reversed on the law, the indictment reinstated and the matter remanded for further proceedings.

ENTER:

s/ Jerome L. Reinstein
Deputy Clerk.

MEMORANDUM DECISION

Lupiano, J.P., Silverman, Evans, Markewich, JJ.

1429 The People of the State of New York,

Appellant, I. Anolik

-against-

Stanley Robert Rappaport,

Defendant-Respondent. D. Rapaport

Order, Supreme Court, New York County (Rothwax, J.), entered November 30, 1976, dismissing the indictment charging the defendant with criminal contempt in the first degree is unanimously reversed on the law, the indictment reinstated and the matter remanded for further proceedings.

During the course of a Grand Jury investigation regarding bribery and official misconduct, the defendant was called to testify. On the first day of the hearing, defendant was told that he would receive immunity regarding his testimony, but was advised that he could be subjected to prosecution for the crimes of perjury and contempt. The nature of the crimes were described to defendant. Defendant was advised that criminal contempt could be committed by not answering, or by giving a response to a legal and proper interrogation that is so evasive, so equivocal as to be the same as saying "I'm not going to answer". He indicated understanding of his status and obligations. After defendant's lapse of memory, the Assistant District Attorney reminded the defendant of his obligations and again warned him that "an immunized witness may be subject to prosecution should he give answers that are so false, so evasive and as not giving answers at all."

Memorandum Decision

On the third day of the hearing, defendant again replied that he had no questions concerning his status as an immunized witness. There ensued a professed inability to recall the facts of several subjects explored as necessary to the investigation. This led to his being indicted for giving "equivocal, evasive, conspicuous, unbelievable and patently false answers."

In dismissing the indictment, the trial court agreed that defendant had not been sufficiently warned that his answers might subject him to charges of evasive conduct under *People v. Cutrone,* 50 AD 2d 838.

The People urge that a witness may be punished for false and evasive profession of an inability to recall, amounting to no answer at all (*People v. Ianniello,* 36 NY 2d 137); further, that there is no requirement that a person be warned not to commit a crime while he is in the process of committing it; due process requiring only that the crime be defined with sufficient clarity so that a person of ordinary intelligence has fair notice that his contemplated conduct is forbidden (*Papachristou v. City of Jacksonville,* 405 U.S. 156).

As reason for its reversal in *Cutrone,* the court said: "Implicit in each of the cases cited is the requirement that the witness be warned that his continued recalcitrance in answering proper questions would expose him to charges of criminal contempt." Here, the witness was given such an admonition before he began testimony, and when it became apparent that a pattern of evasion was developing, he was once again admonished. Defendant even then persisted. At all times he indicated knowledge of his status as an immunized witness.

Defendant argues that he was lulled into a sense of security that he was testifying properly. By what course of reasoning he arrives at this conclusion evades the mind. The District Attorney

asked the same questions repeatedly and the defendant cannot in good faith say that the reason for reiteration was lost on him. Indeed, on the second day he was advised of his vulnerability to prosecution for evasive answers. If we were to adopt a rule that required the prosecution to warn the witness every time an otherwise unresponsive answer was made, the witness might, quite rightly, claim harassment.

Accordingly, the question of whether the defendant committed evasive contempt should properly be resolved at trial.

Order filed.

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-367

STANLEY ROBERT RAPPAPORT,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Preliminary Statement

Petitioner Stanley Robert Rappaport testified before a New York County Grand Jury investigating official corruption on July 13, 14, and 23, 1976. As a result of giving evasive answers, he was indicted for CRIMINAL CONTEMPT IN THE FIRST DEGREE, in violation of Penal Law Section 215.51.

The indictment was dismissed on November 30, 1976 by Justice Harold J. Rothwax, sitting in Supreme Court, New York County, on the grounds that Rappaport had not been warned that he was committing evasive contempt while he was in the act of answering evasively. Justice Rothwax's decision was reversed by the Supreme Court, Appellate Division, First Department, on December 27, 1977, and the indictment was ordered reinstated. *People* v. *Rappaport,* 60 A.D.2d 565, 400 N.Y.S.2d 351 (1st Dept. 1977). The order of the Appellate Division was affirmed by the New York Court of Appeals on June 7, 1979. *People* v. *Rappaport,* 47 N.Y.2d 308, 418 N.Y.S.2d 306 (1979). Petitioner now seeks a writ of certiorari to review the decision of the New York Court of Appeals.

The Proceedings Below

The Grand Jury Investigation

The New York County Grand Jury was investigating whether a pending divorce action had been corruptly influenced by the husband and those acting on his behalf. Rappaport, an auctioneer who had been appointed to liquidate some of the property owned by the divorcing couple, was called before the Grand Jury and questioned concerning certain statements he had allegedly made to the wife and her attorney indicating that the case had been "fixed." It was Rappaport's evasive answers to these questions which led to his indictment for criminal contempt

Rappaport testified before the Grand Jury on July 13, 14, and 23, 1976. By appearing as a witness, he automatically received transactional immunity pursuant to New

York Criminal Procedure Law Section 190.40. Prior to examining Rappaport on July 13, the Assistant District Attorney explained the purpose of the Grand Jury investigation (4-5)* and the rights Rappaport had as a witness. He explained that although Rappaport had been granted immunity, he might still be prosecuted for perjury or contempt committed in the course of his testimony before the Grand Jury (9). With respect to the latter, he said:

> Q. Now, the crime of contempt may be committed in one of two ways. One way in which an immunized witness may commit the crime of contempt is to answer in response to a legal and proper interrogatory by saying, I'm not gonna tell you, I'm not gonna give you an answer or some words to that effect. Do you understand that?
>
> A. Yes, sir.
>
> Q. Now, the second way in which an immunized witness may commit the crime of criminal contempt is by giving a response to a legal and proper interrogatory that is so evasive, so equivocal, so conspicuously unbelievable and patently false as to be the same thing as saying I'm not going to answer. You understand that?
>
> A. Yes, sir.
>
> Q. Let me give you an example. Let's assume in the context of this investigation it were a legal and proper question for me to ask you did you get married last week. And let's assume that the witness to whom that question was addressed said, maybe yes, maybe no. It's possible I got married last week, and indeed it is probable I got married last week but I don't remember. That type of response to that type of question may subject that witness to prosecution for the

* Page references are to the minutes of the First July 1976 Grand Jury in the case of *The People of the State of New York* v. *Richard Roe, et al.*

crime of criminal contempt because as I am sure you'll agree that is so evasive, so equivocal and so conspicuously false that it is the same thing as saying I am not going to answer that. Now, do you understand that?

A. Yes, I do. (10-11)

Mr. Rappaport was then permitted to leave the room and confer with his attorney (13-14). When he returned, he was asked the following questions by the Assistant District Attorney:

Q. Do you have any questions whatsoever about your status as an immunized witness?

A. Very definitely not. I am prepared to testify to anything you ask.

Q. Do you understand all of the instructions given you by Mr. Brown and myself upon your initial appearance in the grand jury?

A. Yes, sir.

Q. You understand both your rights as an immunized witness and your obligations?

A. Definitely.

Q. You have no questions whatsoever?

A. No, sir.

Q. Are you prepared to proceed?

A. Definitely. (13-14)

Rappaport then proceeded to testify concerning his knowledge of possible irregularities in the divorce proceeding.

The indictment for evasive contempt arose from answers Rappaport gave on July 23, 1976, the last day of his testimony. He was asked whether, within the past two months, he had stated, in the presence of the wife and a friend of hers, that a Referee appointed in the divorce action kicked back sixty percent of his fees to persons responsible for his appointment.

Rappaport responded by stating that he did not recall whether he had made the statement in question. The question was repeated and rephrased nine separate times, and each time Rappaport answered by professing an inability to recall whether he had made the statement (219-220, 273-274). Rappaport was subsequently indicted for one count of CRIMINAL CONTEMPT IN THE FIRST DEGREE, in violation of Penal Law Section 215.51.

The Decision of Justice Harold J. Rothwax Dismissing the Indictment

Rappaport moved to dismiss the indictment, claiming *inter alia* that he had not been sufficiently warned that his answers might subject him to charges of evasive contempt. Justice Rothwax agreed, and on November 30, 1976, dismissed the indictment, stating that:

> [It] would seem that a warning, to be effective, must be delivered, not only before a witness first begins to testify, but also at a time when he still has an opportunity to cure his unresponsiveness; that is, contemporaneously with the questioning which has elicited the evasive answers. Clearly, this was not done in the instant case. (Petitioner's Appendix, pp. 12a-13a)

The Decision of the Appellate Division Reversing the Dismissal of the Indictment

On December 27, 1977, the Appellate Division, First Department, unanimously reversed the decision of Justice Rothwax, and ordered the indictment reinstated. After reviewing the explanation of evasive contempt given to

Rappaport, the various warnings concerning evasive contempt which Rappaport had received in the course of the proceedings, and Rappaport's continued affirmances that he understood his rights and obligations as an immunized witness, the Court concluded:

> Defendant argues that he was lulled into a sense of security that he was testifying properly. By what course of reasoning he arrives at that conclusion evades the mind. The District Attorney asked the same question repeatedly and the defendant cannot in good faith say that the reason for reiteration was lost on him. (Petitioner's Appendix, pp. 17a-18a)

The Decision of the Court of Appeals Affirming the Decision of the Appellate Division

On June 7, 1979, the Court of Appeals unanimously affirmed the decision of the Appellate Division reinstating the indictment, observing that although a witness should be informed that he may be prosecuted for contempt if he gives evasive answers, the prosecutor need not "repeat the admonition, or have the court direct an answer, every time the witness' testimony becomes vague or evasive." The Court noted that an admonition to the witness "is not necessary to put the witness on notice when, as here, he had been fairly, indeed generously, informed of the extent of his immunity and his continuing liability to criminal prosecution if he answers evasively." The Court concluded that Rappaport was not trapped into committing contempt "in view of the prosecutor's careful reframing and repetition of the questions and his representation, acknowledged by the witness, that the inquiry was important to the matter under investigation" (Petitioner's Appendix, pp. 7a-8a).

POINT I

The Court lacks jurisdiction to review this case because (1) the judgment of the Court of Appeals is not "final" within the meaning of 28 U.S.C. § 1257, and (2) petitioner never presented his constitutional claims to the courts of New York State as required by 28 U.S.C. § 1257.

(1) Under 28 U.S.C. § 1257, this Court has jurisdiction to review the decision of the Court of Appeals only if that decision is "final." A decision is final only if it marks an effective end to the entire litigation and not merely to an intermediate or interlocutory stage of the litigation. *Market Street Railway Company* v. *Railroad Commission of the State of California,* 324 U.S. 548, 551 (1945). The finality rule, in force since 1789, serves to protect the resources of the Court and of the litigants. In addition, when one of the litigants seeks to overturn a decision of a state court, the requirement of finality is "an important factor in the smooth working of our federal system." *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 124 (1945).

The New York Court of Appeals has not entered a "final" judgment within the meaning of 28 U.S.C. § 1257. The Court affirmed an order of the Appellate Division reinstating the indictment. Thus, the litigation between the State of New York and petitioner over the crime charged in the indictment is once again in a pre-trial phase. The fact that the litigation is still in progress renders the decision of the New York Court of Appeals non-final. The case may be disposed of by plea, acquittal, or in some other fashion which will render the issue here moot. If, ultimately, the petitioner is convicted after trial, and that convic-

tion is affirmed by the state courts, he will then be able to present his claim to this Court.

(2) The writ should be denied because petitioner failed to "specially set up or claim" a federal constitutional right in the courts of New York State, as required by 28 U.S.C. § 1257 (3). The petition for a writ of certiorari raises, for the first time, claims under the Fifth, Sixth and Fourteenth Amendments to The United States Constitution. None of these claims was presented by petitioner in his briefs submitted to the Appellate Division, First Department, or to the New York Court of Appeals. Petitioner argued his case as a matter of state law, and never alerted the Court of Appeals to the federal constitutional grounds which he now claims are involved. The decision of the Court of Appeals rests on state rather than federal grounds. As this Court observed in *Lynch* v. *New York ex rel. Pierson,* 293 U.S. 52, 54 (1934):

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Since petitioner has satisfied neither of the aforementioned requirements, the petition should be dismissed for lack of jurisdiction under 28 U.S.C. § 1257.

POINT II

Petitioner has not demonstrated sufficient reason for this Court to review the decision of the New York Court of Appeals.

The decision of the New York Court of Appeals does not present an issue of national significance warranting review by this Court. The Court of Appeals merely decided that on the facts of this particular case, petitioner had received sufficient warning that he risked evasive contempt charges by answering as he did. Petitioner has not suggested any conflict among the reported state decisions on the question of whether a witness must be warned not to commit evasive contempt while he is in the very act of testifying before the Grand Jury. Nor has petitioner suggested that the issue he raises has any national importance, or is of interest to anyone except himself.

This Court has recently reviewed the question of whether a witness testifying before the Grand Jury must be interrupted and admonished not to commit a testimonial crime. In *United States* v. *Mandujano,* 425 U.S. 564, 581-582 (1976), this Court decided that once a Grand Jury witness has sworn to give truthful answers, it would be superfluous to require the prosecutor to warn him not to commit perjury. The Court quoted with approval from *United States* v. *Winter,* 348 F.2d 204, 210 (2nd Cir. 1965):

> Once a witness swears to give truthful answers, there is no requirement to "warn him not to commit perjury, or conversely to direct him to tell the truth." It would render the sanctity of the oath quite meaningless to require admonition to adhere to it.

Since there is no need to warn a witness not to commit perjury, there should be no need to warn a witness not to

commit evasive contempt; evasive contempt is practically indistinguishable from perjury since the essence of evasive contempt is "a false and evasive profession of an inability to recall." *People* v. *Ianiello,* 36 N.Y.2d 137, 141 (1975). Whether the crime is perjury or evasive contempt, the oath taken by petitioner served the purpose of a warning —to impress upon petitioner his obligation to testify in an honest and straightforward fashion or risk prosecution. Given that the Court has recently spoken on the issue raised by petitioner, in *Mandujano,* it would serve no purpose to grant the petition.

Nor would the purposes of certiorari be served where it is clear from the record and the decisions of the appellate courts of New York State that petitioner was treated fairly in all respects. He was given a detailed explanation of evasive contempt, which he acknowledged he understood, and the critical question was put to him nine times without eliciting a responsive answer. As the Appellate Division observed, "the defendant cannot in good faith say that the reason for reiteration was lost on him."

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel

November, 1979